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SOCIAL SECURITY ENCOUNTERS COMMON-LAW MARRIAGE IN NORTH CAROLINA*

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Introduction

Since the early days of 1937 the problems attendant on that ancient trouble-maker, common-law marriage, have been a very real concern to those persons in Washington and elsewhere who are administering the Social Security Act.[1] At first glance this condition may seem surprising in the face of the small number of decisions dealing with such marriages in the jurisdictions which permit them.[2] However, further analysis will explain this sparsity of appellate court opinions in the common-law marriage field.

Obviously most of the reported decisions involving common-law marriages concern property disputes which arise after the death of one of the parties—usually the husband. And, unless the amount of property justifies litigation (a condition rarely present in the stratum of society which finds common-law unions attractive), nothing will be gained by bringing into the open a relationship contracted without the formal blessing of either church or state. Consequently, when a common-law marriage does exist, its creation, existence, and eventual dissolution by death or otherwise may go unnoticed by all save those intimately associated with the couple in question. Even dissolution by death rarely provokes litigation for the simple reason that the "estate" of the average common-law spouse is frequently non-existent.

Today, however, a new order of events is emerging which will make common-law marriage a more frequent actor on the legal stage, except in those jurisdictions where such unions have been wholly inhibited by statute. The common-law spouse, who yesterday would have died penniless, today because of the Social Security Act will leave an estate which soon will justify litigating the validity of his alleged marriage.[3]

* All opinions expressed in this article are those of the author as an individual only. They are in no sense binding upon either the Social Security Board or the office of the General Counsel to that Board. The author is indebted to Mr. Leonard Calhoun and Mr. Thomas Clifford Billig, Assistant General Counsel and Senior Attorney to the Board, respectively, for valuable suggestions in the preparation of this manuscript.

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[1] 49 STAT. 620 (1935), 42 U. S. C. A. §§301-1305 (Supp. 1937).

[2] Very few cases involving common-law marriages have reached the highest state courts. These figures are typical: Alabama, 16; Florida, 11; Georgia, 13; Iowa, 13; Minnesota, 11; South Carolina, 8; South Dakota, 4.

[3] Provided his or her occupation is not one of the following employments which are excluded (49 STAT. 620, 625 (1935), 42 U. S. C. A. §410(b) (Supp. 1937))

Under the Social Security Act every one of the millions of wage-earners[4] in covered employments who dies before the age of sixty-five will leave a claim to a federal death payment.[5] Moreover, many of those who live beyond sixty-five and actually participate in monthly benefits will die shortly after reaching that age and also leave claims to death payments.[6] And a vast number of persons now covered by the Act will work long enough to make these federal payments, in either case, a considerable sum, even though their monthly earnings may be small.

Such being the situation, the question naturally arises, who will receive these benefits payable on the death of the wage-earner? Congress, in the Social Security Act, named "the estate" of the deceased wage-earner as the payee[7] and also enacted, in Section 205 thereof, that:

"If any amount payable to an estate under section 203 or 204 is $500 or less, such amount may, under regulations prescribed by the Board, be paid to the persons found by the Board to be entitled thereto under the law of the State in which the deceased was domiciled, without the necessity of compliance with the requirements of law with respect to the administration of such estate."[8]

Accordingly, where the applicant for a death benefit alleges that she is the legal widow (or legal widower in case the applicant is a husband)

from the operation of the Act: (1) Agricultural labor; (2) domestic service in a private home; (3) casual labor not in the course of the employer's trade or business; (4) service as an officer or seaman on an American or foreign vessel; (5) employment by the United States or an instrumentality thereof or (6) by a state, political subdivisions thereof, or instrumentalities of a state or states or their political subdivisions; (7) service in the employment of exclusively religious, charitable, scientific, literary, or educational organizations not operated for private profit.

[4] The Social Security Board has received, as of January 31, 1938, 37,349,905 applications for social security account numbers. This figure does not include 576,381 void applications.

[5] The Act (49 STAT. 620, 623 (1935), 42 U. S. C. A. §403(a) (Supp. 1937)) provides, in substance, that there shall be paid to the estate of an individual who dies before attaining the age of sixty-five, an amount equal to three and one-half per centum of the total wages earned by such person after December 31, 1936.

[6] In the event that death occurs after some benefits have been received, the estate will be paid the difference between what the deceased received and the three and one-half per centum (49 STAT. 620, 624 (1935), 42 U. S. C. A. §§403(b, c) (Supp. 1937)). To receive old-age insurance benefits under the Act during his lifetime, the recipient must be a "qualified individual", *i.e.*, he must be at least sixty-five years of age; he must have earned not less than $2,000 in wages in a covered employment before attaining that age and after December 31, 1936, during five calendar years (49 STAT. 620, 625 (1935), 42 U. S. C. A. §410(c) (Supp. 1937)). Wages means "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include that part of the remuneration which, after remuneration equal to $3,000 has been paid to an individual by an employer with respect to employment during any calendar year, is paid to such individual by such employer with respect to employment during such calendar year." 49 STAT. 620, 625 (1935), 42 U. S. C. A. §410(a) (Supp. 1937).

[7] 49 STAT. 620, 623 (1935), 42 U. S. C. A. §403 (Supp. 1937).

[8] 49 STAT. 620, 624 (1935), 42 U. S. C. A. §405 (Supp. 1937).

of the deceased wage-earner because of a common-law marriage, the Board must make two findings, *both dependent on state law,* before certification can be made directly under Section 205. These findings are (1) that the law of the particular state recognizes common-law marriage and (2) that the applicant has met the conditions prescribed by the law of that state for establishing herself as the common-law spouse. If the allegation of marriage is premised on acts occurring outside the domiciliary state, additional complications appear.

Such is the background to the problem which is the thesis of this article. Experience already has demonstrated to the Social Security Board that in many cases applications for benefits under Section 205 are premised on the alleged existence of a common-law marriage. At the present time lump-sum death payments are in most cases very small and, consequently, the ascertainment of the legal position of common-law spouses in the fifty-one jurisdictions[9] is usually the task of the Social Security Board. However, in the near future when death payments become larger, this problem will confront courts and lawyers up and down the land. The question of the validity of common-law marriage in North Carolina already has arisen in connection with applications filed from that state. A review of the North Carolina cases is therefore of immediate interest.

Common-Law Marriage Generally

As an introduction to the specific question to be considered, some remarks of a general nature regarding the subject of common-law marriage are believed appropriate.

The decisions generally agree that a common-law marriage is a marriage entered into by contract only, without solemnization in any of the forms generally required by either church or state. Such unions are of two types: (a) *per verba de futuro cum copula* and (b) *per verba de praesenti.* The former class is virtually extinct[10] as a result of either adverse decisions,[11] or statutes repudiating common-law mar-

[9] Title II of the Act applies to employment within the United States (49 STAT. 620, 625 (1935), 42 U. S. C. A. §410(b) (Supp. 1937)) which includes the forty-eight states, Alaska, Hawaii, and the District of Columbia. 49 STAT. 620, 647 (1935), 42 U. S. C. A. §1301(a)(2) (Supp. 1937).

[10] At least two authorities state that there is no decision in the United States that *de futuro* marriages are valid. MADDEN, PERSONS AND DOMESTIC RELATIONS (1931) 58; JACOBS, CASES ON DOMESTIC RELATIONS (1933) 399 n. See also L. R. A. 1915E 33, and the cases cited in 38 C. J. 1319, 1320, §94, n. 43, 45. MADDEN, *op. cit. supra,* states that the true doctrine is that an agreement to marry in the future, followed by copula, is at best only prima facie evidence of marriage, and that the prima facie case may be rebutted by evidence, circumstantial or otherwise, tending to show that there was no present intent or agreement at the time of the copula to consummate a marriage or to convert the executory agreement into a present actual marriage.

[11] See, for example, *In re* Danikas' Estate, 76 Colo. 191, 194, 230 Pac. 608, 609 (1924); Marsicano v. Marsicano, 79 Fla. 278, 289, 84 So. 156, 160 (1920); *In re*

riages generally.[12] *De praesenti* marriages, *i.e.*, marriages resulting from a present, mutual consent to be husband and wife, are of two classes: those based on express contract and those resting on implied contract.[13] The fundamental problem in the case of marriage by express contract is whether or not subsequent cohabitation in the marital relation[14] is necessary to a valid union.[15] Alleged marriages based on implied contracts present this question: Do the various incidents of the cohabitation, the "habit and repute" of marriage, justify the inference of a contract in the absence of an express oral or written agreement? However, these are subordinate matters, to be considered after it has

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Svendsen's Estate, 37 S. D. 353, 367, 158 N. W. 410, 414 (1916); Salvini v. Salvini, *et al.*, 2 S. W. (2d) 963, 966 (Tex. Civ. App. 1928).

[12] ARIZ. REV. CODE ANN. (Struckmeyer, 1928) §2170; JONES ILL. STAT. ANN. (1935) §78.04; MO. STAT. ANN. (1932) §2977. S. D. COMP. LAWS (1929) §102, defines marriage as a "personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties, or obligations." This validates marriages *per verba de praesenti*. *In re* Svendsen's Estate, 37 S. D. 353, 367, 158 N. W. 410, 414 (1916). Section 105, by requiring the consent to be to a marriage commencing instantly, and not to an agreement to marry afterwards, invalidates *de futuro* marriages. *In re* Svendsen's Estate, *supra*.

[13] ". . . Every marriage must be by contract, express or implied; that is, the relation of husband and wife must be assumed, as such, by mutual consent." Grigsby v. Reib, 105 Tex. 597, 602, 153 S. W. 1124, 1126, L. R. A. 1915E 8 (1913). Hulett v. Carey, 66 Minn. 327, 336, 69 N. W. 31, 34 (1896), another leading case, declared that it was "mutual, present consent, lawfully expressed, which makes the marriage." See also Adger v. Ackerman, 115 Fed. 124, 126 (C. C. A. 8th, 1902); United States v. Dorto, 5 F. (2d) 596, 597 (C. C. A. 1st, 1925); 2 SCHOULER, MARR., DIV., SEP., AND DOM. REL. (6th ed. 1921), §1171. *et seq.*; KEEZER, MARR. AND DIV. (2d ed. 1923) §73. See (1914) 27 HARV. L. REV. 378 on the general subject of the requisites and proof of common-law marriages.

[14] Cohabitation in any other relation is insufficient. "The evidence must support a matrimonial cohabitation, as distinguished from a meretricious one." Arnold v. Chesebrough, 58 Fed. 833, 835 (C. C. A. 2d, 1893), *cert. denied* 154 U. S. 493 (1893). See also *In re* Callery's Estate, 226 Pa. 469, 472, 75 Atl. 672, 673 (1910); Clancy v. Clancy, 66 Mich. 202, 206, 33 N. W. 889, 891 (1887); Griffin v. Griffin *et al.*, 225 Mich. 253, 257, 196 N. W. 384, 385 (1923).

[15] Billing and Lynch, *Common-Law Marriage: A Problem of Social Security* (1938) 22 MINN. L. REV. 177; Note (1919) 3 Minn. L. Rev. 426. Grigsby v. Reib, 105 Tex. 597, 602, 153 S. W. 1124, 1126, L. R. A. 1915E 1, 3 (1913), criticizes both the doctrine and the cases denying the necessity of cohabitation as an element of common-law marriage. There is a sharp conflict among the states as to whether or not cohabitation is an element prerequisite to a valid common-law marriage. For example, Alabama [White v. White, 225 Ala. 155, 142 So. 524 (1932); Herd v. Herd, 194 Ala. 613, 69 So. 885 (1915)], Mississippi [Jones *et al.* v. Lamensdorf *et al.*, 175 Miss. 565, 167 So. 624 (1936)], South Dakota [*In re* Svendsen's Estate, 37 S. D. 353, 158 N. W. 410 (1916)], and Texas [Grigsby v. Reib, *supra*] do require cohabitation in the marital relation; Minnesota [Billig and Lynch, *supra*] and Missouri [Davis v. Stouffer, 132 Mo. App. 555, 112 S. W. 282 (1908)] do not. One weakness in the former rule is the period of time which must elapse before the marital status is fixed. Carried to an extreme, the effect is to require sexual relations before the matrimonial relationship is legally established, a result defeating the real purpose of the marriage laws. See note, L. R. A. 1915E 24-25, and MADDEN, PERSONS AND DOMESTIC RELATIONS (1931) 61-62.

been determined that the particular state recognizes common-law marriage. Is North Carolina one of them?

Common-Law Marriage in North Carolina

American commentators agree almost unanimously that common-law marriages are invalid in North Carolina.[16] The authority for this opinion is a line of cases of which *State v. Wilson*[17] is the most recent and most frequently cited. The case involved an appeal by one defendant who had been convicted of conspiring with several other defendants to procure certain women to have carnal intercourse with them by means of fraudulent marriages. The "marriage" consisted of a mock ceremony performed by an unauthorized person. The conviction was reversed and a new trial granted because of the lack of sufficient evidence in the record. The defendant urged, in arrest of the judgment, that no offense was charged, because, despite the fraud, a valid marriage resulted from the consents given at the sham ceremony. This theory of the defense was thus answered in the opinion:[18]

". . . It was urged that consent makes marriage, and, therefore, though the person solemnizing it was neither 'an ordained minister or a Justice of the Peace,' (nor was the marriage according to the customs

[16] See I VERNIER, AMERICAN FAMILY LAWS (1931) 107, and the several authorities there cited; MAY, MARRIAGE LAWS AND DECISIONS IN THE UNITED STATES (1929) 320; 38 C. J. 1316, n. 3.

The North Carolina statute [N. C. CODE ANN. (Michie, 1935) §§2493-2505] does not expressly invalidate common-law marriage. It (§2493) would seem to do no more than name the persons who may create a marriage and the manner in which they are to perform their office, being in the same category as similar statutes in other jurisdictions which have not been construed to invalidate common-law marriages in the absence of express words of nullity, *i.e.*, words of nullity requiring no construction. The statute (§2493) is aimed at marriage by an unauthorized person, for marriage without a license is valid, although its solemnization is unlawful (§2493), the officer performing it being liable for a penalty (§2499). State v. Robbins, 28 N. C. 23, 25 (1845); State v. Parker, 106 N. C. 711, 713, 11 S. E. 517, 518 (1890); Maggett v. Roberts, 112. N. C. 71, 74, 16 S. E. 919, 920 (1893); Wooley v. Bruton, 184 N. C. 438, 440, 114 S. E. 628, 629 (1922). It was said in note L. R. A. 1915E 114, that the courts have consistently upheld marriages contracted according to the principles of the common law where the statutes made provision "in the ordinary form for license, authority of celebrant, manner of solemnization, certificate, registration, and the like." However, it was pointed out (at p. 118) that North Carolina was among the jurisdictions in which a contrary conclusion was reached being influenced by certain colonial statutes. It should be noted here that in Meister v. Moore, 96 U. S. 76, 79, (1877), it was said, *obiter*, that although statutes of the type under consideration were generally construed as directory, North Carolina was a notable exception. This fact the court explained by pointing out that "the statute contained a provision declaring *null and void* all marriages solemnized as directed, *without a license first had.*" (Italics supplied.) The statement seems to conflict with *State v. Robbins* and *State v. Parker, supra.*

For a general discussion of the effect of marriage statutes on common-law marriages, see notes (1906) 2 L. R. A. (N.S.) 353, L. R. A. 1915E 113. See also (1925) 39 A. L. R. 538; (1929) 60 A. L. R. 541.

[17] 121 N. C. 650, 28 S. E. 416 (1897).

[18] *Id.* at 655, 28 S. E. at 418.

of the Society of Friends), as provided in *The Code,* Section 1812, it would be a valid marriage. Such is not the law in North Carolina. Consent is essential to marriage, but it is not the only essential. 14 Am. and Eng. Enc., 472, note 3. In this State it must be acknowledged in the manner, and before some person, prescribed by the Section of *The Code* just cited. No celebration was required by the Canon Law prior to the Council of Trent, nor by the Civil Law, nor by the law in Scotland, nor in many States of this Union. In some States the question has never been decided. In other States celebration before some person authorized by law is held essential, as (after some hesitation) has been held to be the common law in England. Stewart Marriage & Div., Section 90; 14 Am. & Eng. Enc., 515. In the latter class is North Carolina.

"There is no such thing as marriage simply by consent, in this State. Ruffin, C. J., in *State v. Samuel,* 19 N. C., 177, and *State v. Bray,* 35 N. C., 290; Gaston, J., in *State v. Patterson,* 24 N. C., 346; Pearson, C. J., in *Cooke v. Cooke,* 61 N. C., 583, and the same is recognized as the law in the more recent cases of *State v. Parker,* 106 N. C., 711, and *State v. Melton,* 120 N. C., 591. . . ."

The court then reviewed the discussion of the history of North Carolina marriage laws set out in the *Bray* case,[19] and stated in conclusion:[20]

"From this summary, it may be seen that a marriage pretendedly celebrated before a person not authorized would be a nullity, and a conspiracy to procure a woman to submit herself to the embraces of a man by false and fraudulent representations that the officiating person had authority to solemnize the rites of matrimony would be a conspiracy to do an unlawful act, and indictable. . . ."

It is unfortunate that the *Wilson* case does not present a factual situation which would more definitely constitute a real common-law marriage. As it is, only by its language does the case indicate that common-law marriages are not recognized in North Carolina. The marriage in question was not a common-law marriage or any other kind of marriage because there was no valid consent, and consent, as the court points out,[21] is the first essential to marriage. The defense asserted that although the ceremonial marriage was a sham, the consent thereto produced a valid union precluding a conviction for conspiracy to procure a fraudulent marriage. This approach was evidently on the theory that, the attempted marriage being invalid, a common-law marriage resulted.[22] The court stated generally that "consent" marriages are invalid in North Carolina. However, on the facts, a direct and pointed answer might have been that there was no marriage of any kind because nobody had consented. The "husbands" consented only to a sham; the

[19] See treatment of this case *infra,* n. 34 and accompanying text.
[20] State v. Wilson, 121 N. C. 650, 657, 28 S. E. 416, 418 (1897).
[21] *Id.* at 656, 28 S. E. at 418.
[22] Ashley v. State, 109 Ala. 48, 19 So. 917 (1895); Herd v. Herd, 194 Ala. 613, 69 So. 885 (1915); and cases cited in 38 C. J. 1320, §95 and notes.

"wives" consented only to a non-existent ceremonial marriage. Assuming common-law marriages to be invalid, if there had been (by estoppel or otherwise)[23] a mutual agreement to marry which the parties adhered to despite the non-observance of the required formalities, the prosecution could have been for lewd conduct.

If *State v. Wilson* is the authority for the invalidation of common-law marriage in North Carolina, the above criticism, if well taken, necessitates an examination of the cases cited by the court to sustain its decision. The first was *State v. Samuel.*[24] There, on an indictment for murder, the defendant, a slave, had objected to the introduction of a slave woman as a witness for the state on the ground that she was his wife and therefore incompetent to testify against him. The Supreme Court overruled this contention, holding that only a marriage *de jure,* not *de facto,* could work this exclusion. The opinion then continued with the following discourse on the creation of marriages:[25]

". . . It has been urged that the essence of this, as of other contracts, consists in the consent of the parties; which if expressed before any witnesses, in any words, or by any acts, fully denoting present consent, renders the contract obligatory by the law of nature and reason; and it was thence inferred, that it is necessarily binding in our law, in the absence of positive provisions to the contrary.

". . . We do not agree that persons *sui juris* are legally married merely in virtue of their own consent, however explicitly expressed, in terms of immediate agreement, unless it be so expressed in presence of those persons who are designated by law to be witnesses thereto . . . it is plain from the earliest period of our legislation, that in consequence thereof, it has been constantly required as an essential requisite of a legal marriage, that it should either be celebrated by some person in a sacred office, or be entered into before someone in a public station and judicial trust. The very first chapter found in our oldest statute book, 1715, c. 1, contains such provisions on this subject, as one of vital importance to the prosperity of the young colony. From the terms of that act, and of those subsequently passed in 1741 and 1778, and the constant usage ever since, the court considers this to be clearly the law in this state."

It should be noted that the *Samuel* case concerned an alleged contract of marriage between parties whose status precluded them from making *any* contracts of *any* type.[26] The court was much concerned

[23] An ostensibly mutual contract of marriage, valid and sufficient on its face, cannot be successfully avoided by mental reservations and a secret intention of one of the parties not to marry. *In re* Imboden's Estate, 111 Mo. App. 220, 86 S. W. 263 (1905), and authorities cited.

[24] 10 N. C. 177 (1836). [25] *Id.* at 180.

[26] On the authority of the *Samuel* case, the court in Doe on demise of Howard v. Howard *et al.,* 51 N. C. 235, 236 (1858), held that slaves could not enter into the marriage relation because they had not the legal capacity to make a contract, Marriage being based on contract, the relation of man and wife was excluded among slaves, "both on account of their incapacity to contract, and of the para-

with that phase of the case and dwelt at some length on the unhappy condition of enslaved persons. The court said that the references in certain statutes to the "marriage" of slaves meant merely a sort of concubinage, permissive on the part of the master and voluntary on the part of the slave. However, the court did not hold that the marital contract, like others, could not be entered into by slaves; it put aside the question of their right to marry until presented "in a case in which it shall directly arise."[27] However, ability so to contract was assumed for the purposes of this statement from the opinion:[28]

". . . Assuming for the occasion, therefore, that marriage is an exception from the principle on which their contracts generally are deemed null, and that in law they may marry, yet, in the absence of particular regulations for the marriage of slaves, to give validity to a marriage contracted by them, it must be such a marriage, as by the general law, is valid. . . ."

Here again is an unfortunate case upon which to predicate a rule, for the court, when it does not agree that persons *sui juris* are legally married merely "in virtue of their own consent," is indulging in dictum.[29] No such persons were involved in the case, for slaves were definitely not *sui juris*. The statement of the court with reference to the invalidity of marriages by consent would also appear to be dictum:[30] the apparent marital relation existing between slaves was merely a sort of concubinage allowed by the state and voluntarily entered into by the

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mount right of ownership in them, as property." In Spaugh *et al.* v. Hartman *et al.*, 150 N. C. 454, 455, 64 S. E. 198, 199 (1909), it was said concerning slave marriages that while "the marriage of slaves was not recognized as a legal bond, it is well known that in numberless instances the marriage relation was assumed by them, and to all intents and purposes, except in law, they became man and wife, and the appellation of 'husband and wife' was used in reference to the parties to such unions by their owners and their associates.

"By the common law it is held to be a general rule of universal application in civil cases, except in actions for criminal conversation, that reputation, cohabitation, the declarations and conduct of the parties are competent evidence to prove that the marriage relation subsisted between them. . . .

"We are of opinion that the same rule of evidence should apply in proving that the *quasi* marriage relation referred to in the statute existed between slaves. . . ." [The statute in question (N. C. Pub. Laws 1879, c. 73) added to the canons of descent by legitimating children of colored parents born at any time before January 1, 1868, or persons living together as man and wife and conferring on all such children the rights of heirs at law or next of kin with respect to the estate of such parents or either of them.] And see Walker *et al.* v. Walker *et al.*, 151 N. C. 164, 166, 65 S. E. 923, 924 (1909).

[27] State v. Samuel, 19 N. C. 177, 182 (1836).

[28] *Ibid.*

[29] For a definition of dictum in a case involving common-law marriage, see Grigsby v. Reib, 105 Tex. 597, 602, 153 S. W. 1124, 1126, L. R. A. 1915E 8 (1913).

[30] In L. R. A. 1915E, it is stated in a footnote at p. 119 that State v. Samuel, 19 N. C. 177 (1836) carefully pointed out that the question of validity of a marriage not entered into according to statute was not directly involved and therefore not finally passed on. Despite this, the note continued, State v. Wilson, 121 N. C. 650, 28 S. E. 416 (1897) cited it to the point that there was no such thing as marriage by mere consent in North Carolina.

slave *if* he could get his owner's permission. Obviously it was not a marriage in any legal sense, for it could be dissolved by the owner at will and furthermore, a marriage between persons *sui juris* does not require the consent of third parties.

State v. Patterson,[31] another case relied on in *State v. Wilson*, was an indictment for bigamy, the defense being that the alleged bigamous marriage had not been consummated and, therefore, no crime had been committed. The testimony was declared wholly irrelevant because:[32]

". . . Marriage, or the relation of husband and wife, is in law complete, when parties, able to contract and willing to contract, actually have contracted to be man and wife in the forms and with the solemnities required by law. . . ."

Here is another weak case upon which to found the rule prohibiting informal marriage. There was no common-law marriage. To the contrary, there were two ceremonial marriages. The court simply held that testimony as to the existence of consummation was of no import because the fact of marriage was not dependent upon consummation. Only by inference does the foregoing statement invalidate the common-law union in North Carolina. In order to accomplish the latter purpose there must be read into the statement quoted the word "only" between the words "complete" and "when".[33]

The next authority cited in the *Wilson* case was *State v. Bray*.[34] This was another indictment for bigamy, the question being whether or not there had actually been two marriages. The validity of common-law marriage in the state was not raised. Upon an appeal from a judgment of conviction, a new trial was awarded in order that a jury might determine the authority of the minister officiating at the allegedly bigamous marriage.[35] Again we encounter the inferential establishment of the rule that common-law marriages are invalid. What the case really involved was two attempted ceremonial marriages. It is cited as an authority for the proposition that non-ceremonial marriages are invalid

[31] 24 N. C. 346 (1842). [32] *Id.* at 355.

[33] Generally, statutes setting up certain formalities for contracting valid marriages are construed as directory, not mandatory. See note 16, *supra*.

[34] 35 N. C. 198 (1852).

[35] The court examined the North Carolina statutes concerning the authority to perform marriages at some length to ascertain whether or not the marriage had been perfomed by an authorized person, *i.e.*, "a minister, capable of entering upon the duties of such a charge, according to the ecclesiastical economy of his church, with the faculty of celebrating the rites of matrimony." It was held necessary for this question to be determined by a jury. In Smith v. North Memphis Savings Bank, 115 Tenn. 12, 89 S. W. 392 (1905), the Supreme Court of Tennessee quoted and affirmed an earlier case, Bashaw v. State, 1 Yerg. 177 (Tenn. 1829), which declared common-law marriages invalid in that state, and also considered the North Carolina statutes in an interesting opinion. That consideration was made apropos because the two states were originally one, North Carolina ceding Tennessee to the Federal Government in 1789. For a criticism of the *Bashaw* decision, see footnote 16 in L. R. A. 1915E 119.

on the theory that if such marriages had been valid the authority of the minister at the second marriage would not have been an issue, for the reason that a bigamous informal marriage would have resulted even though the formal ceremony failed.[36] While this is true, the case still leaves the North Carolina law without a decision squarely in point as to the invalidity of common-law marriage.

Several other decisions were relied on in *State v. Wilson. Cooke v. Cooke*[37] was similar to the *Bray* case. A marriage was declared invalid because the person solemnizing it acted without authority, although it could be validated by retrospective legislation.[38] *State v. Parker*[39] was also concerned with the legality of an alleged bigamous marriage, and it was held, following *State v. Bray*,[40] that the validity of the marriage depended upon the authority of the person performing it, the statute law set out in the *Bray* case still continuing in effect, although it had been somewhat broadened. It should be noted that the court did not declare that common-law marriages were invalid, but merely said that the Code, Section 1813, forbade any officer or minister from performing a marriage without the required license. If such officer or minister was actually authorized to solemnize marriages, failure to comply with the licensing requirements subjected him to a penalty, but the marriage was nevertheless valid.[41] The court pointed out that Section 1812[42] of the

[36] See note 22, *supra*. In the opinion in the *Bray* case, 35 N. C. at 203, it was said: "It was not necessary, therefore, to the validity of the marriage that the witness should appear to have been a minister in charge of a church, or the rector of a parish, or pastor of a particular flock. But it is necessary that he should have appeared to be a minister, capable of entering upon the duties of such a charge, according to the ecclesiastical economy of his church, with the faculty of celebrating the rites of matrimony."

[37] 61 N. C. 583 (1868).

[38] The case involved a petition for dower, defendants objecting to petitioner's recovery thereof on the theory that the marriage between petitioner and the deceased was invalid because performed by a justice of the peace appointed by the Confederate Government after the subjugation of the state by the Union forces. The court held that the justice of the peace, an official of a defunct government, had no authority to solemnize a marriage after that subjugation; a marriage so entered into was invalid but could be validated by retrospective legislation remedying the original defect in the form of the ceremony to comply with the statute. The formal defect was the solemnization by a person who was neither a *de jure* nor *de facto* officer of the state. However, the marriage was not a nullity or void, as shown by the following language (at p. 587): "We are of opinion that the Convention had power to give validity to this marriage. On this distinction: If the marriage be a *nullity* for the want of the essence of the matter, that is, the consent of one of the parties, as in the case of Crump v. Morgan, 3 Ire. Eq. [38 N. C. 91 (1843)], where, one of the parties being lunatic, the court decreed a divorce 'of nullity of marriage,'—neither a Convention, nor Legislature, nor any other authority has power to make the marriage valid; but if the marriage be invalid by reason of the non-observance of some solemnity which is required by statute, as the presence of a minister of the gospel or a justice of the peace, that want of form may be supplied by an ordinance of a Convention. . . ."

[39] 106 N. C. 711, 11 S. E. 517 (1890). [40] 35 N. C. 198 (1852).

[41] Section 2498, N. C. CODE ANN. (Michie, 1935), is the modern counterpart of Section 1813. The penalty provision, then in Section 1817, is in Section 2499 of the present code. [42] N. C. CODE ANN. (Michie, 1935) §2493.

Code authorized the solemnization of the ceremony by an ordained minister or a justice of the peace. It was then noted that the statute was broader than at the time when the decision in the *Bray* case was rendered. The failure to show that the minister possessed certain qualifications previously required and which caused the *Bray* case to be sent back for a new trial, was declared to be immaterial. If this case is an authority for the proposition that common-law marriages are invalid, it is such by inference only.

The last decision cited by the court in the *Wilson* case was *State v. Melton,*[43] and again the point in issue was the existence of an allegedly bigamous marriage. The court stated that North Carolina, by the statute of 1866,[44] had adopted, with regard to slave marriages, the rule which had long prevailed in Scotland, and in New York and several other states, that consent followed by cohabitation constituted a legal marriage. Far from holding that common-law marriages were invalid, the case merely decided that concubinage between slaves, ripening into marriage by virtue of the statute of 1866, created a marriage sufficient to make any subsequent union bigamous.

Evidently the inference which the court in *State v. Wilson* drew from the *Melton* case was that, since the enactment of the statute of 1866 was necessary to extend the principles of common-law marriage to informal unions between slaves, there must have been no general recognition of common-law marriage in the state. Had there been such recognition, the enactment of 1866 would have been superfluous, for slaves who continued to live as husband and wife could establish a common-law marriage by reason of their emancipation.

As some doubt has been cast upon the generally accepted rule of invalidity of common-law marriage in North Carolina, there remains the task of examining the cases cited as conflicting, or at least as introducing confusion into the law. One of those doubts is found in the statement that "North Carolina, in the first instance, declared itself strongly against informal marriages, by what was conceded to be a *dictum,* but later cases are more or less inconsistent with the theory that such marriages are invalid."[45] The *Samuel,*[46] *Cooke*[47] and *Wil-*

[43] 120 N. C. 591, 26 S. E. 933 (1897).

[44] N. C. Pub. Laws 1866, c. 40, §5, provides that emancipated slaves who cohabited in the relation of husband and wife should be deemed lawfully married as of the time of the commencement of the cohabitation. See N. C. CODE ANN. (Michie, 1935) §2497, State v. Whitford, 86 N. C. 636, 637 (1882).

[45] L. R. A. 1915E 18, footnote 40. "The Supreme Court of North Carolina in 1836, in a case involving slave marriages, branched out from that precise question and discussed the matter of common-law marriages, and while pointing out that the general rule as to consensual marriages was not directly involved and was not, therefore, to be finally passed upon declared that it did not agree that persons *sui juris* were legally married merely in virtue of their own consent, however exclusively expressed in terms of immediate agreement, unless it was so expressed in the presence of those persons who were designated by law to be wit-

son[48] cases were noted as sustaining the rule, but it was asserted in this statement that *Jones, et al. v. Reddick, et al.*,[49] took for granted that the "common law prevailed". Another intimation that the law was not as clear as could be desired is found in a note[50] which, although listing North Carolina as one of the states not recognizing this type of union, added "But see Jones v. Reddick. . . ."

The *Jones* case was, indeed, one which might give rise to confusion. The action was for the recovery of land, the plaintiffs' right thereto depending upon whether or not they were the lawful children of A. E. Jones, son of F. Jones, the testator. At the trial, E. T. Jones testified that he visited A. E. Jones, who was his brother, in Savannah, Georgia, during the Civil War, and that his brother was then married and had three children. The witness had no personal knowledge of the marriage, but testified that Sarah, the woman in question, conducted herself as a wife and was regarded as such in the home. A deposition of another witness was introduced to the effect that the plaintiffs were the children of A. E. Jones and Sarah, his wife. There was also in evidence a certified copy of a marriage license and a certificate of marriage signed by the minister who had performed the ceremony. The defendant requested the court to instruct that this evidence was insufficient to warrant a finding that A. E. Jones had been legally married and that the plaintiffs were his children. The request was refused and a verdict and judgment for the plaintiffs followed, from which the defendants appealed.

In the opinion rendered on appeal, the Supreme Court said:[51]

"No actual marriage was shown, nor was it shown, or offered to be shown, what would constitute a valid marriage by the laws of Georgia, where the marriage was alleged to have been celebrated. But in all Christian States, especially in the States of the American Union, which, although in some respects foreign to each other, have a common origin, and in other respects, a constitutional community of rights and interests, it is presumed that the common law prevails, and that the same *proofs* which are sufficient to establish the fact of marriage in one State, will be likewise sufficient to establish the same fact in another State. . . .

"By the common law it is held to be a general rule, of universal application in civil causes, except in actions for criminal conversation, that

nesses thereto." Citing State v. Samuel, 19 N. C. 177 (1836). In a footnote at p. 35, it was said that although the validity of common-law marriage had been doubted in North Carolina, ". . . it was summarily declared in other cases that evidence of cohabitation, reputation, etc., was competent to establish marriage except in actions of crim. con. . . . In Jones v. Reddick . . . such evidence was held admissible apparently upon the theory that the common law was in force, and necessarily so in order to render such evidence competent."

[48] State v. Samuel, 19 N. C. 177 (1836).
[47] Cooke v. Cooke, 61 N. C. 583 (1868).
[48] State v. Wilson, 121 N. C. 650, 28 S. E. 416 (1897).
[49] 79 N. C. 290 (1878).
[50] (1925) 39 A. L. R. 551.
[51] 79 N. C. 290, 292 (1878).

reputation, cohabitation, the declarations and conduct of the parties, are *competent evidence* of marriage between them. . . .

"As such *evidence* would have been competent *to establish marriage in this State by the common law,* by the same law it must be held to be competent to establish, that the parties were legally married according to the laws of Georgia. There was not only sufficient, but *plenary evidence* of the marriage." (Italics supplied.)

The *Jones* case seems to be one of a line of decisions which have not added to the clarity of the North Carolina law on this subject.[52] The earliest of these decisions is *Whitehead (Widow) v. Clinch.*[53] There the plaintiff petitioned for dower[54] and, concerning the proof by which she sought to establish her marriage to the deceased, it was said:

". . . the Court permitted oral evidence to be given of cohabitation in proof of the marriage, notwithstanding the English authorities require a certificate of the bishop, because there is no record kept here of marriages, as in England there is; consequently, no certificate of any officer can be had, and unless parol evidence be received we shall invalidate all the marriages in the country."

Another early case, decided in 1799, was *Felts and wife v. Mary Foster et al.*[55] The plaintiffs were entitled by the will of one Foster, deceased, to a considerable part of his property in the event of a remarriage by his widow, one of the defendants. In the plaintiffs' bill, the charge was made that the widow actually had married the other defendant, but the alleged husband and wife *severally denied this by their answers.* Despite this denial, the jury found that the parties were married. On appeal, the Supreme Court rendered this opinion:[56]

"The answers of the defendants ought to be read to the jury and by them considered. *There is in this case no positive proof of a marriage,* but there are circumstances advancing to create a belief that a marriage has taken place: they have lived together a long time, as man and wife, have had several children, and the witnesses say that she was a woman of irreproachable character, before these things happened. If so, a presumption arises that she would not thus have cohabited with the defendant, unless a marriage had been previously solemnized. Upon such evidence, I think the jury may find a marriage." (Italics supplied.)

The decision is an unusual one. Not only was positive proof of the marriage entirely lacking, but there was a positive denial by both of the defendants that they had intermarried. To sustain the alleged union and offset that denial there were only circumstances evidencing a habit and repute of marriage and yet the court was able to conclude that the

[52] See note 50, *supra,* and accompanying text.
[53] 3 N. C. 3 (1797).
[54] N. C. Pub. Laws 1784, c. 22, §9.
[55] 1 N. C. 164 (1799).
[56] *Id.* at 73. The quotation is of the entire opinion.

jury might reasonably find a marriage.[57] Mere "circumstantial advancing to create a belief", and not positive proof, were sufficient to prove a marriage against the denials of those who of all persons should have known whether or not there had been a ceremony—the parties themselves. *Implied* contracts of marriage have been established by circumstances similar to those present in this case in states recognizing common-law marriages,[58] but rarely has a court gone so far as to uphold an inference of a *ceremony* despite the denials of the persons allegedly parties thereto.

Weaver v. Cryer & Moore[59] continued the line. The action was trover for certain cattle, the plaintiff proving that the animals were levied on as the property of Bridget Weaver by the defendant Moore, a constable, and bought by the defendant Cryer, and that Bridget Weaver had sold them to the plaintiff before the levy. At the sale, a woman who lived with the plaintiff claimed the cattle by gift from Bridget Weaver. Plaintiff, who was present when this claim was made, said nothing, but did prove at the trial that it was generally reputed that the woman who lived with him was his wife, she being white and he a mulatto.

The defense requested the court to instruct that common reputation would not be evidence of a marriage between a mulatto and a white woman, as the policy of the country forbade such connections. The request was declined and the jury informed that they were at liberty to infer a marriage from reputation and cohabitation. In the opinion by the Supreme Court it was said:

". . . The opinion [of the court below] affirms two propositions . . . . The other is, that a marriage between a mulatto and a white woman, may be proved by common reputation. . . ."[60]

". . . On the question of Evidence, I apprehend that the law was correctly stated—that general reputation and cohabitation, are evidence of a marriage; it is so in all cases, except in actions for *crim. con.*"[61]

Thirty-two years later *Archer v. Haithcock*[62] was decided. The case was an action of ejectment, the only question raised being the sufficiency of a deed from one Avy Hood to the defendant. It was conceded that unless the deed was good the plaintiffs were entitled to recover.

[57] This conclusion necessitated some devious reasoning: the character of the woman was so irreproachable as to preclude any possibility of her engaging in an illicit relationship, therefore she must have been married. But that same character was so base and devoid of the elementary attributes of honor that the court could find that she would not hesitate to deceive it and the jury by false answers, therefore she was lying when she said she was unmarried.

[58] See note 13, *supra*.

[59] 12 N. C. 337 (1827).

[60] *Id.* at 339.

[61] *Id.* at 341 (the case was reversed on other grounds). "Crim. con." is, of course, an abbreviation of criminal conversation.

[62] 51 N. C. 421 (1859).

The right to the estate covered by the deed was in Avy Hood at the time when she intermarried formally, under license and before witnesses with James Hood. Avy and James Hood made the deed as husband and wife, but it was not authenticated by separate examination of the woman apart from her husband, as required by law. The defendant insisted that it was legally sufficient despite this failure because Avy's marriage to Hood was invalid, he being at that time already married to another. Consequently, it was alleged that the woman's deed was good as that of a *feme sole,* even though executed by her in her married name.

The evidence showed that James Hood had lived with one Grace Patterson, that they had several children, and were reputed to be husband and wife. The lower court charged the jury that " 'where a man and woman lived together, and passed and were recognized as man and wife, it was evidence, to submit to them, of a marriage,' " and that if there was such a marriage, Hood's later union with Avy Johnson while Grace Patterson was alive was void, and Avy Johnson's deed was valid. There was a verdict and judgment for the defendant and the plaintiffs appealed. In the opinion rendered by the Supreme Court it was said:[63]

". . . the jury, by their verdict, say they were satisfied that the said Hood and Grace Patterson had been married.

"There was *direct* evidence of the solemnization of a marriage between Hood and Avy Johnson, and the question is, does this *direct evidence* of one marriage exclude and render incompetent, or insufficient in law, the *circumstantial evidence* upon which the jury have found the former marriage?

"It is held to be a general rule that reputation, cohabitation, and the declaration and conduct of the parties, are competent evidence of a marriage between them, except in two cases, i.e., on an indictment for bigamy and in an action of 'crim. con.' . . . . But these two exceptions are fixed and, *stare decisis.* We are not, however, disposed to make another exception without a reason. Especially, as, in this State, there is no registry of marriages, and frequently, circumstantial evidence is the only mode of proving one."

In 1860, the Supreme Court decided *Jackson, et al. v. Rhem, et al.,*[64] which arose out of a petition for a distributive share of the estate of Edward Rhem, intestate. The petition alleged that Rhem left no children but was survived by a brother and a large number of nephews and nieces, including the plaintiffs. The defendants denied the right of the plaintiffs to share in the estate, alleging them to be the illegitimate offspring of the intestate's deceased brother.

The testimony showed that the deceased brother and the mother of the alleged illegitimates had lived together for twenty years as husband and wife, enjoying the reputation of being married during that time,

[63] *Id.* at 422.

[64] 59 N. C. 141 (1860).

although there was no evidence that they actually had been married. Other evidence consisted of a marriage bond reciting the securing of a license by the deceased brother to marry the mother of the plaintiffs and the testimony of several witnesses that they had heard the deceased say on several occasions, both before and after the reputed wife's death, that he had never married her. One of the issues submitted to the jury was whether or not the couple were ever "lawfully married". There was a verdict for the plaintiffs and the case was removed to the Supreme Court, which held:[65]

". . . We are of opinion that when a man and woman have lived together for many years, treating each other as man and wife, and have been so reputed to be in the neighborhood where they lived, during all the time, in which they thus cohabited; and where they have had children, which were treated by the parents as legitimate, up to the time of the death of the latter, we think that the testimony, which should induce a court to declare against the marriage of the parties, and thereby to bastardize their issue after their deaths, ought to be so overwhelming as to leave not a doubt about the facts thus declared. It was a well known rule of the ecclesiastical law, that if two persons, who labored under canonical disabilities intermarried with each other, the marriage could not be declared to have been void after the death of both, or either of the parties. That rule does not prevail in our law, because we do not recognize the ecclesiastical as part of our common law of marriage. . . ."

The next decision, *Ferrall et al. v. Broadway,*[66] was rendered in 1886. The case originated in a proceeding for partition in which the sole issue was the legitimacy of certain claimants of lands left by an intestate. The alleged marriage was sought to be established by conflicting circumstantial evidence, all of which was of the character generally relied on to prove common-law marriages.[67] In the words of the

[65] *Id.* at 143.

[66] 95 N. C. 551 (1886). The verdict in the lower court was set aside and an order for a *venire de novo* granted because of an erroneous instruction to the jury.

[67] The opinion stated (at p. 553) that "There was no direct evidence of an actual marriage, no witness being produced who was present when the ceremony was performed, and no evidence found of the issue of a marriage license authorizing it. The nearest approximation to such proof, is the intestate's declaration one Sunday evening, that he was going off to be married, and his going off and returning with the said Elizabeth, but he did not then say he had been married, and there was evidence of his having been seen going in a different direction from that leading to the county to which he had said he was going.

"The evidence consisted in declarations of the intestate, wholly irreconcilable, as to his marriage—his recognition of the paternity of the children—the internal domestic management of affairs, as if the parties were husband and wife, and general reputation, was in conflict. There was produced an entry in the family Bible, written by the intestate, of the births of the three younger children, each of whom is described as the child 'of J. W. Broadway and Elizabeth, his wife,' and the date of their respective births given.

"The witnesses to the general reputation and to the declaration of the intestate, were numerous, and their testimony entirely different, except as to the earlier

court, "there was no direct evidence of an actual marriage", but the jury found that one existed on evidence of a habit and repute of marriage. There was nothing in the case to indicate that the marriage sought to be proved was other than a ceremonial marriage.

In *Forbes et al. v. Burgess,*[68] in the absence of direct evidence, a ceremonial marriage[69] was established by general reputation, statements of the alleged husband, and the action of the parties in recognizing their relation as that of man and wife.

It has been noted[70] that in *State v. Wilson*[71] the repudiation of consent marriages was categorically stated and supported by the *Samuel,*[72] *Patterson,*[73] *Bray,*[74] and *Cooke*[75] cases. Those decisions were cited as definitely establishing the invalidity of consent marriages, a doctrine which the court said was recognized in the later *Parker*[76] and *Melton*[77] cases. If they are conclusive, that very fact makes an opinion rendered thirty-four years after the *Samuel* case and twenty-eight, eighteen, and two years after the *Patterson, Bray,* and *Cooke* cases, respectively, even harder to explain. That opinion was handed down in *State v. Ta-cha-na-tah.*[78] The case was an indictment for murder and at the trial a witness offered by the defendant, an Indian, was rejected, upon objection by the state, because she was allegedly the defendant's wife. It was admitted by the prosecution that the rites of matrimony had not been performed between the two according to the laws of North Carolina or in any other form. The asserted relation was sanctioned only by tribal custom, and consisted of cohabitation as man and wife and a recognition of the parties as such by other members of the tribe. However, the relation could be dissolved at pleasure, the couple then being free to marry again. It was held that this arrangement was not such as would work a disqualification of the witness on the ground that she was the defendant's wife. Concerning the alleged marriage on which the objection was based the court said:[79]

"There is but one law of marriage in this State, which applies equally to all citizens. Our law regards marriage only as a civil contract. Every

period of the intercourse, when there is a general concurrence as to its unlawfulness."

[68] 158 N. C. 131, 73 S. E. 792 (1912).

[69] One of the charges given by the lower court and quoted in the opinion (158 N. C. 131, 133, 73 S. E. 792) was premised on the finding by the jury of "a lawful ceremony of marriage".

[70] See note 24, *supra,* and accompanying text.

[71] 121 N. C. 650, 28 S. E. 416 (1897).

[72] State v. Samuel, 19 N. C. 177 (1836).

[73] State v. Patterson, 24 N. C. 346 (1842).

[74] State v. Bray, 35 N. C. 198 (1852).

[75] Cooke v. Cooke, 61 N. C. 583 (1868).

[76] State v. Parker, 106 N. C. 711, 11 S. E. 517 (1890).

[77] State v. Melton, 120 N. C. 591, 26 S. E. 933 (1897).

[78] 64 N. C. 614 (1870).

[79] *Id.* at 616.

one is at liberty to superadd to that whatever sanctities his religion may require. Even if it be true, that by the law of North Carolina, a marriage *per verba de presenti* followed by cohabitation, but without any form of ceremony whatever, is to be deemed valid, (as to which we express no opinion,) yet it can never be held that mere cohabitation, with an understanding that it may cease at pleasure, can constitute a marriage, or carry with it the rights and disabilities of that relation. . . ."

This language of the North Carolina Supreme Court indicates that the doubt cast upon the finality of the non-recognition of common-law marriages by some commentators was not theirs alone. However, one salient fact is common to all the other cases of this second group—they are directed to a question of evidence, *i.e.*, what *circumstantial* evidence is sufficient to prove a marriage in the absence of *direct* evidence? The substantive law of informal marriage is not involved.

Conclusion

It is unfortunate that the two lines of North Carolina decisions touching common-law marriage concern that subject only incidentally. Despite this failure, the theory of invalidity of informal marriages in North Carolina receives support of an affirmative and negative character from both lines of cases.

The best affirmative assertion of the non-recognition of common-law marriage is found in the *State v. Samuel* line—not, however, in the dicta of the *Samuel* and *Wilson* cases or the bare statement of *State v. Patterson,* but in the inferences of the *Bray, Cooke,* and *Parker* cases. The last three would have been decided the other way if common-law unions had been valid—the first three would not. And the accepted rule of invalidity may be negatively supported: there are no decisions to the contrary. If this statement is true we must reconcile it with the assertions that the cases appear to be in conflict.[80]

In the first place, the common law, where not abrogated, repealed, or obsolete, is still in force in North Carolina.[81] Secondly, the cases state that North Carolina has prescribed a statutory method of contracting marriage.[82] An assumption that this prescription abrogates common-law marriage is consistent with the cases, whereas a contrary assumption is not, because the decisions treat the statute as mandatory. However, it does not follow that the whole body of the common law has been discarded. It is only the *substantive* common law which has been abrogated—the *evidentiary* common law has been retained. The plausibility of this explanation is thus indicated by one of the commentators who asserts that a confusion exists in the North Carolina decisions:

[80] See notes 45, 50, *supra,* and accompanying text.
[81] N. C. CODE ANN. (Michie, 1935) §970.
[82] State v. Samuel, 19 N. C. 177, 180, 181 (1836); State v. Bray, 35 N. C. 289. 296 (1852); State v. Wilson, 121 N. C. 650, 656, 28 S. E. 416, 418 (1897).

"The absolute dissociation of the evidential theory of habit and repute from the substantive doctrine of marriage in fact is most forcibly illustrated by the fact that habit and repute are received as evidence of marriage even where the substantive common law has been rejected by the courts or abrogated by statute."[83]

This dissociation is the key to the distinction between *State v. Wilson* and its predecessors and the *Jones v. Reddick* line. The latter cases were addressed to questions of evidence, that is, the *proof* of marriage and not the *fact* of marriage.[84] The evidence of declarations, conduct, reputation, and cohabitation were admitted to prove a ceremonial, not a common-law marriage. Although these types of evidence are generally associated with common-law unions, they also may be used to prove ceremonial marriages.[85] Resort to this kind of evidence has been necessary in North Carolina because of the lack of direct evidence of ceremonial marriages, a lack so pronounced in the past that it merited comment by the supreme court.[86] And in some of the cases of the *Jones v. Reddick* line, the recognition of the provability of ceremonial marriages by circumstantial evidence has been complete.[87]

In the opinion of the writer, the Social Security Board must come to these conclusions: Common law marriage is not valid in North Carolina. Therefore, the mutual consent to be man and wife, the habit and repute of marriage which would be received in other jurisdictions to establish common-law marriages, cannot be received for that purpose in North Carolina. But the cases show that the abrogation of the common law in North Carolina as to the fact of marriage has not similarly abrogated the common law as to the proof of marriage. Therefore, the Board may accept, in proof of ceremonial marriages in this

[83] Note L. R. A. 1915E 47. The statement quoted would seem to be an adequate answer to the point made in the footnote at page 35 of this same volume, quoted in note 45, *supra*.

[84] Weaver v. Cryer & Moore, 12 N. C. 337 (1827); Jackson, *et al.* v. Rhem. *et al.*, 59 N. C. 141 (1860); Jones, *et al.* v. Reddick, *et al.*, 79 N. C. 290 1878); Ferrall v. Broadway, 95 N. C. 551 (1886); Forbes, *et al.* v. Burgess, 158 N. C. 131, 73 S. E. 792 (1912). As shown by the quotations in the text, the references in these opinions were always to the *evidence* acceptable for the establishment of a marriage.

[85] 4 WIGMORE, EVIDENCE (2d ed. 1923) §§2082, 2083. However, the inference of a ceremonial marriage from such circumstances "will not be so readily drawn unless some satisfactory explanation can be given of the absence of that eyewitness evidence which ought ordinarily to be available if in truth there was a ceremonial marriage,—for example, the certificate or the register." *Id.* §2082.

[86] ". . . in this State, there is no registry of marriages, and frequently, circumstantial evidence is the only mode of proving one." Archer v. Haithcock, 51 N. C. 421, 423 (1859).

[87] Felts and wife v. Foster, *et al.*, 1 N. C. 164 (1799). In Forbes, *et al.* v. Burgess, 158 N. C. 131, 133, 73 S. E. 792 (1912), the court stated that no direct evidence of the performance of the marriage ceremony had been adduced. The proof offered in the lower court was entirely circumstantial, yet the charge to the jury referred only to the "lawful ceremony of marriage" which the jury might find to exist.

state, the same evidence which it accepts to prove common-law marriages in other states.

With these principles in mind, let us observe the manner in which they are applied. The best illustrations of the operations of the Social Security Board with regard to claims based upon the common-law marriage relation are found in the files of such cases. For the purposes of comparison it will be helpful to consider briefly typical cases arising in jurisdictions which recognize common-law marriage, as well as cases arising in North Carolina which does not.[88]

In those jurisdictions adhering to the view that common-law marriages may be established by proof of the contract alone, or by proof from which such a contract may be implied, the Board builds up in its files evidence in the form of affidavits sufficient to establish the required facts. These files constitute an interesting commentary on the nature of common-law marriage: In no claim thus far in any jurisdiction has such a marriage been substantiated by direct proof of a marital contract, either written or oral. Consequently, in all cases the Board has accepted evidence of the habit and repute of marriage to establish the informal union. The files show that this evidence has not been sensational in character. Husbands "just disappear" and after intervals of varying lengths, the deserted spouses, according to their affidavits, "just began living with" someone else. Affidavits of the neighbors frequently establish the required habit and repute of marriage. The neighbors appear merely as the people next door or around the corner who visited the common-law spouses in their home, heard them refer to and introduce each other as husband and wife, and never suspected the existence of an irregular relation. Thus far there have been no cases involving conflicting testimony or reputation, possibly due to the small amounts involved and the fact that the unions, though irregular, were *bona fide*.

Let us consider some typical cases involving benefit payments of less than five hundred dollars. The decisions of State *X* validate common-law marriages rested on a mutual consent to be husband and wife, without requiring a subsequent cohabitation in the marital relation. *A*, an employee in a covered occupation, dies and *B*, the woman who lives with him, files a claim for a lump-sum death benefit. There was no express marital contract, but in her affidavit *B* states that she and *A* had lived together as husband and wife, that he had held her out as being his wife, and that she was recognized as such by their friends and relatives. Two other persons made affidavit that they knew the couple as husband and wife and that they were accepted as such in the

[88] For obvious reasons, names and other identifying facts are omitted from the illustrative cases discussed.

community. There being no other applicants for the benefit and the descent and distribution laws of State *X* permitting payment to the wife, the Board certified direct payment to *B*, the widow. Another case arose in State *Y*, where common-law marriages were recognized as valid only when followed by cohabitation in the marital relation. *B*, claiming as the common-law wife of *A*, a deceased employee formerly working in a covered occupation, was unable to prove an express contract of marriage. However, she did state that the deceased introduced her as his wife, that she held herself out as his wife and was recognized as such by their mutual friends, relatives, and all others with whom they associated. She produced affidavits from two disinterested parties substantiating her statements. Both affidavits set out that the parties were generally known and accepted in the community as husband and wife. There being no conflicting claims and the descent and distribution laws of State *Y* permitting payment to the widow, the Social Security Board certified direct payment to *B*, as the widow of *A*.

In both these cases, although the express contract of marriage was absent, the circumstances proved were adjudged sufficient to establish the fact that at one time or another during the period of cohabitation the parties had impliedly consented and agreed to be man and wife, and to live together in that relation.

By contrast we have this situation in North Carolina: When an applicant files a claim which is predicated on the existence of an asserted common-law marriage contracted within the state, the claimant is immediately discouraged by the field office from proceeding with his or her application. This discouragement is undertaken on the authority of a memorandum from the office of the General Counsel declaring that North Carolina does not recognize common-law marriage. The memorandum itself is based on the cases above discussed. Of course, if the applicant insists upon filing his or her claim, and requests an actual adjudication, it will eventually reach the office of the General Counsel for an opinion directed to its specific facts. Thus far no such claim has been received, presumably because applicants have been satisfied with the decisions made in the field.

The other half of the North Carolina situation would be presented by these facts: *A*, claiming as the spouse of *B*, a deceased employee, asserts that she is his widow by a legal marriage and is therefore entitled to a death benefit. In the absence of contest by other claimants, the widow's own affidavit as to the marriage is accepted as sufficient proof thereof. However, the Social Security Board has received no claims from North Carolina in which the assertions of marriage by an alleged spouse have been controverted by other claimants.

It is reasonable to believe that the future will produce North Carolina claims in which the relationship of husband and wife asserted by one claimant is contradicted by another. In such cases the Board would receive from the claimant spouse the proofs ordinarily accepted to establish marriage—the marriage certificate, the license, the register, and affidavits of the witnesses who were present at the ceremony. Up to this point, the problem of proof of a ceremonial marriage in North Carolina has nothing in common with the problem of proof of a common-law marriage in other states. But the difficulty faced in common-law jurisdictions in establishing informal marriages will manifest itself in North Carolina in the case of a controverted claim by a spouse who cannot prove his or her relationship by *direct evidence* of the type above referred to. That this situation is possible is indicated by the language of some of the cases previously discussed. Therefore in establishing such claims, on the authority of the North Carolina decisions herein studied, the Board will receive in proof of the disputed ceremonial union that circumstantial evidence which is ordinarily associated with proof of the common-law relationship. The same types of evidence which claimants in other states are now using to prove common-law marriages will appear in the files of North Carolina claims to prove ceremonial unions. The reputation of the parties in the community, their cohabitation in the marital relation, their declarations, conduct and statements, their attitude toward their relation—all the circumstances which make up the habit and repute of marriage may then be made the subject of affidavits whose purpose is to establish a formal marriage by ceremony.

It is believed that only a very few cases will arise in which the evidence presented to the Board will not be sufficient to determine conclusively the rights of all applicants. However, in any case where there is a serious dispute as to the existence of a marital relationship, the claimants are protected by the provisions of the act which make optional with the Board the matter of direct payments in all cases involving benefits of five hundred dollars or less.